IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1381 of 1979
with
FIRST APPEAL No 1382 of 1979
and
FIRST APPEAL NO.1383 OF 1979

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

---

STATE OF GUJARAT

Versus

NATIONAL BRICK WORKS

---

Appearance:

1. First Appeal No. 1381 of 1979
Mr. P.K. Shukla, AGP for the appellant-State
MR MD PANDYA for Respondent No. 1

2. First AppealNo 1382 of 1979
MR MD PANDYA for the appellant-State.
Mr.P.K. Shukla, AGP for respondents nos.1 and 2.

3. First Appeal no.1383 of 1979
MR MD PANDYA for the appellants.
Mr.P.K.Shukla, AGP for respondent no.1-State.

---

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 12/04/2001 & 26/04/2001

ORAL JUDGEMENT

Heard the learned A.G.P Mr. P.K. Shukla for the State of Gujarat and learned Advocate Mr. M.D. Pandya for M/s National Brick Works of Godhra, District Panchmahals and its partners.

1. The above stated three appeals arise from a common judgment rendered by the learned Civil Judge (S.D.), Godhra dated 19-3-1979 in the proceedings of Special Civil Suit no.38/1973 and Special Civil Suit no.39/1973. That the subject matter of all these three appeals being cognate, they are heard together and are being disposed of by this common judgment and order.

Special Civil Suit no.38/1973 is filed by M/s. National Brick Works - a registered partnership firm having its office at Godhra, District Panchmahals against the State of Gujarat and one Mr. B.J. Parmar-Executive Engineer, Panam Project Division, Devda Colony, Panchmahals District for the recovery of Rs.22,800/- by way of compensation on account of breach of the contract for supplying bricks entered into between the parties.

Special Civil DSuit no.39/1974 is filed by the State of Gujarat against the said M/s. National Brick Works of Godhra and its three partners for the recovery of Rs.38,900/- towards the compensation for the breach of tender contract of supplying bricks by the defendant to the plaintiff.

That vide impugned judgment and order, Special Civil Suit no.38/1973 is dismissed with costs while Special Civil Suit no.39/1974 was partly allowed and the defendant of the said suit M/s. National Brick Works alongwith its three partners are directed to pay to the plaintiff-State a sum of Rs.200/- with costs of the suit and rejected the rest of the suit claim with costs.

2. That the State of Gujarat being aggrieved and dissatisfied by the above stated judgment and decree rendered by the learned Civil Judge (S.D.), Godhra in the common judgment and decree of Special Civil Suits nos.38/1973 and 39/1974 has preferred First Appeal no.1381/1979 to challenge the part of the decree rejecting the claim of the State for compensation of Rs.10,000/- made towards the carting of the bricks and

Rs.8056/- made towards more consumption of cement due to U.C.R masonry work while First Appeal no.1382/79 is filed by Ms. National Brick Works- a registered partnership firm, against the State of Gujarat and one Mr. B.J. Parmar-the Executive Engineer, Panam Project Division to challenge the decree of dismissal of Special Civil Suit no.38/1973 rejecting the claim of compensation of Rs.22,800/-.

3. That the First Appeal no.1383/79 is also filed by the said M/s. National Brick Works - a registered partnership firm against the State of Gujarat to challenge the decree passed by the learned Civil Judge (S.D.), Godhra on 19-3-1979 in the proceedings of Special Civil Suit no.39/1974 by passing a decree against the appellant-defendant allowing the claim of Rs.200/towards compensation by way of damages for the breach of contract.

4. The brief facts of the suit dispute between the parties could be stated as under:

That on 6-11-1971 M/s. National Brick Works, Godhra( hereinafter referred to as the " Contractor") who is the plaintiff of Civil Suit no.38/1973 entered into a tender contract with the State of Gujarat through Executive Engineer Panam Project Division for supply of 20,00,000 bricks of proper strength and shape at the rate of Rs.75/per 1000 bricks. According to the contractor, there was a precondition in the contract that the State Government had to allot suitable land to the contractor so that from the earth of the said land required bricks could be manufactured of proper strength and shape. It is also contended by the contractor that various lands were shown to the contractor by the Executive Engineer of the State, but none was found suitable to manufacture the bricks of proper strength and shape, and thereby, the contractor could not start the work of manufacture of bricks. However, the Executive Engineer, Panam Project Division of the State arbitrarily fixed the date for supply of bricks in between 20-1-1972 to 20-9-1972 and on account of fault on the part of the State Government, the contractor could not manufacture and supply the contractual number of bricks within the stipulated period, and thereby, the State Government having committed breach of the contract, the contractor has suffered loss of profit which is estimated at Rs.10/-per 1000 bricks, and as such, the contractor has claimed the damages of Rs.20,000/- by way of loss of profit and has also claimed recovery of Rs.2800/- i.e. the security deposit made by the contractor with the State Government,

and thereby, has made the total claim of recovery of Rs.22,800/- with running interest and cost by filing Civil Suit no.38/1973.

5. That the State Government has averred and alleged in Special Civil Suit no.39/1974 that there was no precondition in the tender contract to provide any land to the contractor for the manufacture of bricks, however, an offer was made by way of giving facility and different lands were shown to the contractor from which bricks could be manufactured of requisite strength and shape. As a matter of fact, apart from showing different lands, the State Government made arrangement through Joint Director of Industries, Ahmedabad to supply 20 wagons of slack coal to the contractor for the purpose of manufacturing contractual bricks. That the contractor has availed the said facility and utilised the slack coal provided on priority basis at the instance of the State Government, but has failed to manufacture and supply requisite number of bricks within the stipulated period in the tender contract, and thereby, the Government was constrained to rescind the contract and the work had to be assigned to other contractor for the purpose of procuring requisite number of bricks to complete the Panam Project expeditiously and on account of the said breach committed by the contractor, the State of Gujarat has suffered loss, and thereby, had estimated the damages as under:

Rs.10,000/- Towards the carting cost at the rate of Rs.5/- per 1000 bricks of total 20,00,000 bricks which was required to be transported from the site of new contractor Haji Abdul Majid Bhura to the actual site of work.

Rs.300/- Towards difference in rate of slack coal which department had to pay to new contractor to the extent of 20 tonnes at the rate of Rs.15/-per tonne.

Rs.8056.44ps Towards extra cost of cement required on account of change of masonry work from brick masonry to UCR masonry work, hollow block masonry work and the total cement required to be used in excess being 166.8 metric tonnes at the rate of 48.31 per tonne.

Rs.6510/- On account of loss suffered by delay in completion of Colony Building by the end

of August, 1972 due to non availability of housing at Dam site and the staff had to go from Godhra to Dam site and avail expenditure of travelling allowance of the working staff during the period from 1-9-1972 to 31-3-1973 total seven months at the rate of Rs.930/-per month.

Rs.2639/- Towards the rental charges of two offices housed at that time in hired premises upto 31-3-1973 at the rate of Rs.377/-per month for the period of seven months.

Rs.8400/- Towards the extra running of vehicle charges for visit by Deputy Engineers from Godhra to the site calculated at the rate of 0.40ps. per km of total 3000 kms. during the period of seven months.

Rs.2800/- Claim towards remaining amount of security deposit payable from the bills by the contractor as per tender contract.

Rs.200/- Towards penalty at the rate of Rs.10/for 20 days of late or no supply of the goods.

6. Thus, the State of Gujarat has claimed total amount of Rs.38,904.44 ps. towards loss on account of breach of contract committed by the contractor and has claimed Rs.38,900/- by way of compensation in the suit.

7. That in the proceedings of Special Civil Suit no.38/1973 and 39/1974, written statements were filed by the respective parties from which the trial Court has raised issues vide Exh.20 in Special Civil Suit no.38/1973 and vide Exh.12 in Special Civil Suit no.39/1974.

That the parties led oral evidence and also produced documentary evidence and in consideration of material produced on record, the trial Court has given finding that proper land was allotted by the State Government to the contractor and the contractor has failed to prove that breach was committed by the State Government. On the basis of said findings, Special Civil Suit no.38/1973 filed by the contractor against the State of Gujarat and Executive Engineer claiming damages of Rs.22,800/- is dismissed while in the proceedings of Special Civil Suit no.39/1974 the Court gave the finding that contractor has committed the breach of the tender

contract though proper land was allotted for manufacture of bricks but has held that the State Government has failed to prove that it has sustained damage to the tune of Rs.10,000/- for excess carting charges. It is also held that the State Government has failed to prove that it has sustained damage of Rs.300/- on account of difference of price for supply of slack coal. That the State Government has failed to prove that it has sustained damage of Rs.8056.44ps. on account of excess consumption of cement for change of masonry work to UCR masonry work. That the State Government has also failed to prove the claim of Rs.8400/- towards excess travelling expenses and has also failed to prove the claim of security deposit of Rs.2800/- only.

That on the basis of said finding the trial Court has allowed the only claim of penalty of Rs.200/- at the rate of Rs.10/- for 20 days for non supply of requisite bricks within the stipulated period and rejected all other claims of damages as made in the proceedings of Special Civil Suit no.39/1974 and has passed the decree accordingly.

Thus, the contractor as well as the State Government being aggrieved by the above stated findings and decree passed in Special Civil Suits nos.38/1973 and 39/1974, have filed the above stated three appeals.

8. On perusal of record and proceedings of Special Civil Suits nos.38/1973 and 39/1974, it has to be noted that it is undisputed that the contractor had offered to supply 20,00,000 bricks of requisite strength and shape in a prescribed tender form which is produced on record at Exh.46. However, in the column of remark of said form no."D", the contractor has endorsed that Government land should be allotted for the said work and the rates offered shall be subject to the allotment of Government land. That the dispute between the parties arose in respect to said endorsement as to whether said endorsement created obligation on the part of the Government to supply land for the purpose of manufacturing requisite bricks under the tender contract or by way of some facility it was to be offered.

9. That on appreciation of documentary as well as oral evidence, the trial Court has discussed the matter vide paragraph 40 of the judgment Exh.250 to the effect that while accepting the tender of contractor Exh.46, the Government has not insisted that contractor should delete the condition in respect to providing suitable land to manufacture the requisite bricks. On the contrary the

contractor has initially offered the rate of Rs.75.25ps per 1000 bricks to supply the requisite bricks and Government negotiated with the contractor and persuaded to reduce the rate from Rs.75.25ps to Rs.75/-per 1000 bricks in consideration of the fact that suitable Government land shall be allotted to manufacture the requisite bricks. On the said fact, the trial Court has given a finding that allotment of Government land to manufacture the bricks for supply under the tender contract was not only a facility to be supplied to the contractor, but a condition precedent of the contract for the supply of requisite bricks.

10. It would be pertinent to note that the trial Court has further discussed the evidence produced by the parties and has held that the Government has shown five different sites through Executive Engineer Panam Division for allotment of land to the contractor for the purpose of manufacturing the requisite bricks. That the test report of the soil of the said site shown to the contractor is produced on record at Exh.99 from which it could be inferred that land situated at Asundariya village contained suitable soil for manufacture of tender bricks in respect to requisite strength and shape. Similarly, land situated at Kotah village near the colony site was also suitable as per test carried out to manufacture bricks of requisite strength and shape as per the tender contract. That the Government had offered said land to the contractor to select the site of the land to peform the contractual obligation by manufacturing the bricks. However, the contractor had failed to accept the said land without any reasonable cause and had failed to manufacture and supply the requisite bricks within the stipulated time as per the tender contract, and thereby, the contractor has committed breach of the contract and as per clause (2) and (3) of tender contract Exh.46 the contractor was liable to pay the penalty and the State Government had a right to rescind the contract on account of breach.

11. The learned Advocate appearing for the contractor could not dispute the above stated facts construed by the trial Court while giving the findings that the contractor has failed to establish the breach of contract by the State Government and that breach of tender contract was committed by the contractor, and as such, was liable to pay the penalty and compensation. Furthermore, the contractor could not establish alleged damage sustained on account of alleged breach of the contract by the State Government. That in order to establish the suit claim, the contractor relied upon the oral evidence of one

Isubbhai Abdulb Hamid Batukbhai Exh.109 who has deposed that he had agreed to manufacture the bricks for the contractor at the rate of Rs.55/per 1000/- bricks. However, during the cross-examination he has admitted that he did not manufacture the bricks and he has not claimed any damages from the contractor. The trial Court has based the conclusion on the said facts and, in my opinion, rightly so, that as per tender contract, the contractor was precluded from giving a subcontract and evidence led by the contractor could not inspire confidence. Not only that, but the contractor has failed to establish that he had to pay any damages to the subcontractor. The contractor having committed breach of the contract cannot claim compensation for suffering the alleged damage, and as such, the claim made by the contractor of Rs.20,000/for loss of profit at the rate of Rs.10/-per 1000 bricks in respect to the contract of supply of 2 lakhs bricks is rightly rejected by the trial Court. Furthermore, as the breach is committed by the contractor and contract is rescinded the security deposit of Rs.2800/- made by the contractor is liable to be forfeited and the contractor had no right to claim the said amount. On the said reasoning the trial Court has rightly rejected the total suit claim of Rs.22,800/- made by the contractor in Spl.Civil Suit no.38/1973. That on the said conclusion, the trial Court has rightly dismissed the suit of the contractor being Spl.Civil Suit no.38/1973, and as such, the First Appeal no.1382/1979 is without any merit, and thereby, is liable to be rejected. Not only that but on the finding that contractor has committed the breach of the contract for supplying the requisite bricks within a stipulated period, the penalty of Rs.200/- levied by the State Government at the rate of Rs.10/- for 20 days being just, proper and reasonable, as time was the essence of the contract, the decree passed against the contractor for the penalty of Rs.200/- is unassailable and the appeal against the same being First Appeal no.1383/1979 is also liable to be rejected.

(RESUMED 26-04-2001)

12. Learned A.G.P. Mr. P.K. Shukla appearing for the State of Gujarat in FA no.1381/1979 has urged that the trial Court has erred by disallowing the claim of Rs.10,000/- towards the damages for extra expenditure required to be incurred by the State for carting of bricks from the site of manufacturer to the site of Works. The Court has also erred by disallowing the claim of Rs.8056.44p. in respect to additional consumption of cement due to U.C.R. masonry work though the Court has given the finding that the contractor had committed a

breach of the contract. Shri Shukla has submitted that State of Gujarat was required to incur above stated expenses as the contractor failed to manufacture and supply the requisite number of bricks within the stipulated period in the tender contract and damage suffered by the State has a direct nexus to the breach committed by the contractor and it cannot be said to be remote damages as held by the trial Court. Under such circumstances, the judgment and decree of the trial Court rendered in Spl. Civil Suit no.39/74 is required to be modified and an additional claim of Rs.18056.44ps.(Rupees eighteen thousand fifty six and forty four paise) is required to be allowed by allowing the appeal.

13. That the trial Court has discussed the above stated aspect of damages claimed by the State Government against the contractor vide paragraphs 68 to 86 of the judgment Exh.250 wherein while discussing the oral evidence of the Executive Engineer Shri P.J. Parmar Exh.120, the Court has held that on failure of the contractor to supply the requisite number of bricks after manufacturing the same within the stipulated period in the tender contract, the State Government had not made any attempt to purchase the same from the market but has invited fresh offers and had accepted the offer of one Haji Abdul Majid Bhura for supply of 2 lakhs bricks at the rate of Rs.75/-per 1000 bricks. That as per the tender contract with new contractor, the delivery of the bricks was to be taken from the site of the contractor and the contractor had failed to include any terms in the contract in respect to carting charges of the bricks from the manufacturing klin. That no evidence is produced on behalf of the Government that carting of said bricks from the klin of the contractor to the construction site was carried out through any agency and actual payment was made towards the carting charges. On the contrary, the material produced on record disclose that no additional expenditure has been incurred by the State Government as the carting work was carried out departmentally and no separate account has been maintained. That in the plaint, the State Government has claimed the amount of Rs.10,000/- by way of damages on the basis of estimated cost of Rs.5/- for carting charges per 1000 bricks.

14. In view of the said facts emerging from the material produced on record, it is difficult to accept the submission made on behalf of the State Government by learned A.G.P. Shri P.K. Shukla that damages of Rs.10,000/-cannot be said to be remote damages and had a direct nexus. That under Sec.73 of the Indian Contract Act, party to the contract is under a duty when other

party has committed breach to mitigate the damages. The State of Gujarat as a party to the contract could have purchased the bricks from the market as they have been purchasing from one "Janta Bricks" of Godhra according to deposition of Executive Engineer Mr. Parmar Exh.120. Instead of that, the Government has undergone fresh exercise of inviting offers and giving the contract and that too without any stipulation regarding carting charges. That the amount of carting charges have not been actually incurred by the State of Gujarat as party to the contract, and hence, it is difficult to hold that the State of Gujarat is entitled to claim the same by way of damages on account of breach of contract. Under such circumstances, it has to be held that the trial Court has rightly rejected the claim of the State of Gujarat of Rs.10,000/- towards carting charges.

15. Furthermore, an amount of Rs.8056.44ps are claimed by the State of Gujarat on account of excess consumption of cement due to change of masonry work from bricks masonry work to U.C.R. masonry work and hollow block masonry for the building. It is difficult to accept the submission made on behalf of the State of Gujarat by learned A.G.P. that such amount of damages cannot be said to be too remote a damage. The contract of manufacture and supply of bricks has nothing to do with the pattern of construction decided by the State of Gujarat as party to the contract on the suit site. There is no nexus between non supply of bricks within the stipulated period and requirement of the State Government to change the pattern of construction from bricks masonry work to U.C.R. masonry work. If the State of Gujarat has changed the pattern of construction to suit their own requirement, that cannot make the State of Gujarat as a party to the contract entitled to claim additional cost of construction on account of breach of contract. The said change in pattern of construction cannot be said to be the primary and immediate result on account of breach of contract, and therefore, the trial Court is justified in rejecting the said claim on the basis of material produced on record. I do not find any substance in the submission urged by the learned A.G.P. in respect to the said part of the claim.

16. On the basis of the aforesaid discussion, First Appeal no.1381/1979 filed by the State of Gujarat against the contractor also fails and is liable to be rejected.

As a result, all these three appeals being First Appeals nos.1381/79, 1382/79 & 1383/79 stand disposed of as rejected with no order as to costs.

(A.K.Trivedi,J.)

stanley-akt.